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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1395

CARMINE G. DESAPIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The "Memorandum" of the Solicitor General is an extraordinary response to the serious and important questions raised in the petition for certiorari.*

The Solicitor General does not deny that this case raises novel and substantial issues of federal criminal law. He does not assert that this case turns on its own facts or that it involves no question of general applicability. He makes no effort to reconcile the decision below either with the decisions of this Court or with those of other Circuits.

I.

Most striking of all is the Solicitor General's silence on the most critical issue in this case—the role of professional informer Herbert Itkin and his relationship to federal law enforcement officials. The full facts as to Itkin's

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* The Solicitor General states that petitioner "here reasserts claims considered and rejected by the court of appeals." (Memorandum p. 2). Every petition for certiorari must do so in order to receive consideration by this Court, and this has not heretofore been considered a ground for denial of certiorari.

true status remain unrevealed, although these facts are peculiarly within the knowledge of the government. The court below conceded that Itkin's true role is controlling, since if he was not a "genuine" coconspirator, the case against petitioner cannot stand. (O. 19a) The court below decided this case on the assumption it was "a close one" and also candidly acknowledged that this case is unprecedented —no other decision has ever gone so far in approving a conviction obtained through the commission of serious crimes by a secret government informer and no decision of this Court validates the practices shown here. (O. 13a, 17a-18a)*

The Solicitor General seeks to uphold petitioner's conviction on the basis of the finding of the court below that Itkin was a genuine coconspirator. Yet the Solicitor General told this Court six months ago, in supporting Itkin's removal of his pending state prosecutions to federal court:

> ". . . Itkin was not 'an individual sent on a specific errand or whose employment was restricted to the performance of a particular chore.' [citation omitted]

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* The very statement of this issue by the Court below shows that plenary consideration by this Court is merited:

> "The FBI's conduct indeed went far beyond the familiar cases of the revenue agent approached with a corrupt proposal who, after reporting it to his superiors and on their instructions, acts out the drama which is closely surveilled and often wired for sound, [citation omitted]; or of the narcotics agent who plays an equivalent role in a pusher's home, [citation omitted]. In such instances, while the government agent participates in a transaction having the elements of a crime, it is one without adverse social consequences; there is no intention that the revenue agent will keep the bribe or that the narcotics agent will sell the narcotics. Here the FBI sat by while people extorted money to induce official action, with knowledge that they planned to keep it for their own use. . . . [The] determination whether the activities of an informer had passed some ill-defined acceptable bounds . . . had best be left to the executive branch, which is accountable for its conduct to Congress." (O. 17a-18a).

> Rather he was a *freewheeling federal informant* whose *duties* were 'to infiltrate organized crime wherever possible . . . .' " (Brief for the Respondent in Opposition, *State of New York* v. *Cooper,* No. 825, O.T. 1970, *cert. denied,* January 12, 1971, p. 12) (emphasis supplied throughout this Reply)

That Brief and Itkin's Brief were sealed and unavailable to us at the time of the filing of the petition for certiorari in this case. They have since been made available pursuant to the order of this Court entered April 5, 1971.

In his Brief supporting removal the Solicitor General also referred to "Itkin's role as an *undercover agent*", his "broad role to infiltrate organized crime", and "his *duties* as a federal informant." (*Id.,* pp. 12-13) None of these characterizations of Itkin's role by the Solicitor General is consistent with the opinion of the court below, on which the Solicitor General now relies as the sole support for denial of a writ of certiorari in this case.

Itkin's Brief to this Court further confirms that Itkin was a government agent during the period covered by the indictment in the present case. It states:

> "From 1953 to 1960, Mr. Itkin's relationship with the CIA was on an occasional basis. However, from 1960 through 1967, Mr. Itkin reported to the CIA on a daily basis. In 1963, the CIA requested Mr. Itkin to meet with high officials of the FBI. Mr. Itkin did so and agreed to work for the FBI as an informant. From the time of that meeting until the resulting testimony in 1967, Mr. Itkin reported on an almost daily basis to the FBI [citation omitted]."
>
> "Mr. Itkin, during this period of 1963 through 1967, was an informant for both the FBI and the CIA. Both agencies gave Mr. Itkin considerable discretion in his investigations and his activities. However, Mr. Itkin

carried out numerous specific assignments developed by said agencies at their request." Brief for Respondent Herbert Itkin in Opposition, p. 4.

II.

There is an even deeper inconsistency between the Solicitor General's positions before this Court on the Itkin removal case and this case. In supporting Itkin on removal, the Solicitor General urged:

> ". . . Itkin has set forth sufficient facts to justify the initial conclusion of the district court that Itkin's participation 'in the acts forming the basis of the State prosecution were performed in furtherance of, and under color of, the role of an informer' [citation omitted]. He is, in short, entitled to present in a federal court his defense that he was acting under federal authority." Brief for the Respondent in Opposition, *supra*, p. 16.

The Solicitor General further stated:

> ". . . it is not unlikely that on a trial on the merits federal agents will be called upon as witnesses and required to produce records in order to clarify Itkin's role." (*Id.*, p. 14)

That is precisely what the defense tried to do at the trial in the present case—to gain access to all information which would "clarify Itkin's role" and show that he was not a "genuine" coconspirator but a government agent. The defense was denied such access in the trial court, and the Solicitor General here upholds that denial. In fact, the one point in the petition for certiorari to which he addresses himself is our contention that the trial court's restriction on defense counsel's examination of materials showing Itkin's relationship with the government was inconsistent with this Court's decision in *Alderman* v. *United States*, 394 U.S. 165 (1968).

The Solicitor General's attempt to escape the application of the *Alderman* principle to the present case is astonishing. He states that, whereas *Alderman* involved discovery of evidence illegally obtained from a defendant, the contention in this case "arises in the very different context of an effort to discover information, *not directly involving petitioner,* about a third-party witness' activities." (Memorandum, pp. 2-3 note 1)

It defies understanding how the relationship of Itkin to the government and Itkin's activities as a secret informer can be characterized as "not directly involving petitioner." Itkin's relationship to the government and his activities at the time of the events in the present case are the key to this case. Unless the key is turned, the truth cannot be known. The validity of petitioner's conviction depends on whether Itkin was a "genuine" coconspirator or a government agent. As we pointed out in our petition (pp. 21-22), Itkin played at least the following parts in the prosecution of petitioner:

1. he initially corrupted James Marcus and instigated the alleged conspiracy which was the subject of the present case;

2. he reported to law enforcement officials on the progress of the alleged conspiracy;

3. he engaged in a number of the overt acts which were offered to support the conspiracy charge;

4. he made out-of-court statements which were introduced against petitioner under the coconspirator rule;

5. he created the federal jurisdiction and the sole basis for the substantive counts by committing the only two interstate acts involved in the case; and

6. he was the principal witness against petitioner at trial.

Moreover, a short answer to the Solicitor General's defense of secrecy is: without disclosure of the facts to defense counsel and the opportunity to make a showing on the issue, how is it possible to know that Itkin's relationship to the government and his activities are matters "not directly involving" petitioner? In this regard, the Solicitor General's reference to footnote 14 of the *Alderman* opinion is erroneous and inexplicable. Indeed, footnote 14 supports petitioner by quoting with approval this Court's earlier statement in *Dennis* v. *United States,* 384 U.S. 855, 874-75 (1966), that ordinarily "[t]rial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony", and that it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities." This Court further stated in *Dennis*:

> "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 384 U.S. at 875.

Dennis, like *Alderman,* justifies our contention that this is an exigent case for disclosure. This Court said in *Dennis*:

> "A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. [citation omitted]. Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for de-

> termining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." 384 U.S. at 873.*

How can the Solicitor General have argued to this Court in Itkin's removal case that Itkin is entitled to prove in a federal court that he was a government agent and still fairly argue in the present case that petitioner is not entitled to full disclosure of the facts and a full hearing on the merits on the identical issue? It is not enough for the Solicitor General to invoke the opinion of the court below. For if Itkin can prove he was a government agent, the premise of the opinion below is gone and by the very terms of that opinion, petitioner's conviction is invalid.

The government's inconsistency places it in the untenable position of seeking merely to retain petitioner's conviction in the present case, a position incompatible with the duty of the prosecution "to seek justice, not merely to convict." ABA, Standards Relating to the Prosecution Function and the Defense Function, Standard 1.1(c) (Approved Draft, 1971); ABA, Code of Professional Responsibility, EC 7-13.

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* Contrary to the Solicitor General's assertion that the *Alderman* contention was "answered" by the court below (Memorandum, p. 2), the court said only that it had "examined the materials which the trial court declined to make available to the defense under 18 U.S.C. § 3500" (the "Jencks Act") and found no error. (O. 24a) The defense inquiry was not limited to Jencks Act statements, however; the defense was seeking to explore the relationship between Itkin and the government. Moreover, *in camera* inspection by the Court of Appeals, without disclosure to the defense, is no more acceptable under *Alderman* than such inspection by the trial court.

III.

The Solicitor General's references to the opinion of the court below on the other points raised by the petition are equally unresponsive. This is most apparent in his treatment of our contention as to the inadmissibility of the post-conspiracy statements. He states that this contention was "answered" by the opinion below. (Memorandum, p. 3). But a comparison of the petition (pp. 11-14, 29-31) with the portion of the opinion below cited by the Solicitor General (O. 21a-23a) shows that this is not and could not be so.

The court below rejected the prosecution's theory of conspiratorial objectives and in its opinion substituted a new theory, never presented to the jury, in order to hold these statements admissible. The opinion of the court below did not "answer" this point of the petition—the opinion generated it. And as the court below conceded, if there were error in receiving these statements, "this would be sufficiently serious to require reversal . . . ." (O. 21a)

Each of the other points in the petition raises a substantial question justifying the granting of a writ of certiorari in this case. They are fully presented in the petition, and the supporting arguments need not be repeated here in light of the Solicitor General's failure to respond to them directly.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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